



In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1538

JOHN D. CALLAHAN, et al,

Petitioners,

v.

CHARLES E. KIMBALL, et al,

Respondents.

On Petition For A Writ of Certiorari To The
United States Court Of Appeals For
The Ninth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF THE PETITION

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The brief for the United States as *amicus curiae* does not question the importance of the decision below to relations between the states and the Indian tribes. However, its analysis of the merits is untenable.

1. The United States does not deny that treaty rights to hunt, fish and trap on the reservation can be exercised only by members of the tribe (see Pet 12).¹ It contends, however, that the tribe retained authority

¹The United States refers to the view of the Court of Appeals that Section 14(b) preserved the rights of everyone who was a member when the Act was adopted, regardless of any subsequent loss of membership (Br 3, 5). That analysis has no support in other cases (Pet 11, n 5) and does not, of course, support the Court of Appeals' decision extending treaty rights to descendants of persons on the final roll.

under the Klamath Termination Act to confer membership on withdrawn members and descendants of persons on the final roll, and that such "members" can exercise treaty rights preserved by Section 14(b), which it describes as personal, not property rights.

This argument is not responsive to petitioners' case, based on the restricted nature of rights reserved in Indian treaties and Congress' decision to exclude those persons from tribal membership.

a. A decision extending treaty rights to persons other than members of the tribe does not preserve those rights, as Section 14(b) contemplates, but enlarges them. Section 14(b) provides only that the Act shall not "abrogate" the treaty right to fish.

b. Section 19 of the Act did not "preserve" the legislative authority of the tribe (Br 8); it terminated it in every respect inconsistent with the Act, including limitations on membership found in Sections 3 and 6.

c. Those unqualified prohibitions on tribal membership are not limited to "property rights." The statutory scheme for preparing a final roll and distributing tribal property was complete without them, and they were unnecessary to determine "who should share" (see Br 5, 8). By their plain terms, they extend

beyond property rights and apply to all attributes of membership.²

Furthermore, the premise of the argument is wrong. Treaty rights are property, as the United States recognizes in arguing that they attached to and burdened reservation land when it was sold under the Act (Br 9). Terminating the right to share in tribal property would eliminate any right to participate in the tribe's treaty rights, along with its other property.

2. To say that respondents do not claim exclusive rights (Br 5, 9) is less than candid. The Klamaths' "proposal" for consensual regulation (Br 4) would require the state to eliminate *all* non-Indian hunting before Indian hunting is regulated *at all*, even to preserve a species, and is, in substance, a demand for exclusive rights. It is not an appropriate basis of regulation, but a smokescreen for destructive and unregulated hunting by the Klamaths.

3. It does not affect the case that Section 14(b) was enacted before the land was sold (Br 9). As in *Puyallup III*,³ the treaty rights in question are based on exclusive occupancy and do not survive a disposition of the land; consequently, there is nothing to which Section 14(b) can apply (see Pet 16-19).

²Withdrawn members did not merely withdraw "from the tribal rolls" (Br 7-8). Under the Act, they ceased "to be members of the tribe."

³*Puyallup Tribe v. Washington Game Dept.*, 433 US 165 (1977).

4. This Court has repeatedly sustained special rights and immunities for Indians against Fifth and Fourteenth Amendment equal protection challenges on the basis of their "peculiar semisovereign and constitutionally recognized status" as Indians. *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, July 2, 1979, U.S. Supreme Court, Slip Opn, p 14, n 20. However, in the case of the Klamaths, Congress terminated that special political status and declared that "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe and the laws of the several states shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." The present claim of the United States that future descendants of pre-Termination Act members have a special immunity or status asserts a distinction based solely on race or national origin, which, if accepted, would present serious constitutional questions.

The petition should be granted.

Respectfully submitted,

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July, 1979

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